

**THOROUGHLY MODERN COPYRIGHT, OR  
*WHAT IN THE DICKENS HAPPENED AFTER RAGNARÖK ?***

**YOCEL ALONSO**, *Sugar Land*  
Alonso, PLLC

*Co-author:*

**JUSTEN S. BARKS**, *Houston*  
Beard + Barks, PLLC

State Bar of Texas  
**32<sup>ND</sup> ANNUAL**  
**ADVANCED INTELLECTUAL PROPERTY LAW:  
OVERVIEW OF IP**  
February 28, 2019  
Dallas

**CHAPTER 1**

## **ACKNOWLEDGEMENT**

NOTA IMPORTANTE: UN ABRAZO TO JENNIFER PEREZ, PROFESSORS MICHAEL OLIVAS AND DAVE FAGUNDES, AND CRAIG STONE FOR THEIR HELP ON THIS LONG AND WINDING ROAD. OF COURSE, THE POTHOLES ARE ALL MINE.

**YOCEL ALONSO  
ALONSO, P.L.L.C.  
130 Industrial Blvd., Suite 110  
P.O. Box 45  
Sugar Land, TX 77487  
281-240-1492  
Yocel@AlonsoLaw.com**

Yocel Alonso is a wannabe conga drummer and Adjunct Professor of Law at the University of Houston Law Center, where he teaches Entertainment Law. He is also the former Chair of the State Bar of Texas Entertainment and Sports Law Section, the Houston Bar Association Entertainment and Sports Law Section.

Mr. Alonso has been in the private practice of law for over 30 years, representing a diversity of clients in the entertainment industry, including recording artists, record companies, publishers, radio and television personalities, venues, and promotion companies. He handles entertainment transactions and disputes concerning recording agreements, royalties, music publishing, contracts, and other businesses.

His first published writings were letters to Marvel Comics which were published in *Tales of Suspense #77* and *Sgt. Fury & His Howling Commandos #85*. He has also written a few other things after earning his law license, including: *Ethics and the Art of Entertainment Law*, published by the American Bar Association in *31 Entertainment & Sports Lawyer 9 (2014)*; *Ethical Issues and Malpractice Prevention For Business Lawyers*, University of Houston Law Foundation Advising Small and Mid-Size Businesses Course, 2008; *Ethical Issues and Malpractice Prevention For Business Lawyers*, University of Houston Law Foundation Advising Small and Mid-Size Businesses Course, 2007; *Ethical Considerations and Malpractice Prevention for Business Lawyers*, University of Houston Advising Small Businesses Seminar, 2006; *Ethical Considerations and Malpractice Prevention in a Small Business Law Practice*, University of Houston Advising Small Businesses Seminar, 2004; *Ethical Considerations and Malpractice Prevention in a Small Business Law Practice*, University of Houston Advising Small Businesses Seminar, 2003; *The Sound of Música: Latin Music Record Deals*, State Bar of Texas Entertainment Law Institute, 2002; *Confidentiality and Privilege Issues in Representing Business Entities: Your Professional Responsibilities*, University of Houston Corporate, Partnership, and Business Law Seminar, 1998; *Economics of the Music Industry*, University of Houston and University of California at Davis Entertainment, Sports, and Publishing Law Seminar, 1997; *Fixing a Broken Record*, State Bar of Texas Appellate Practice Institute, 1995; *Rescuing the Record*, State Bar of Texas Advanced Civil Appellate Practice Course, 1994; *Fixing the Broken Record: Emergency Repairs on Appeal*, University of Houston Appellate Practice Seminar, 1994; *International Litigation*, University of Houston Advanced Civil Litigation Course, 1994; *Preservation of Complaints in Federal Court*, State Bar of Texas Advanced Civil Appellate Practice Course; 1992; *Evolving Issues in Real Estate Litigation*, University of Houston Advanced Business Litigation Course, 1990 and Real Estate Course, 1989.

Chair, State Bar of Texas Entertainment and Sports Law Section, 2004-2005; Chair, Houston Bar Association Entertainment and Sports Law Section, 2010-2011; Treasurer, Houston Bar Association Entertainment and Sports Law Section, 2008-2009; Director, Hispanic Bar Association, 1989-1992. Member, State Bar of Texas Entertainment and Sports Law Council, 2000-2006.

Justen S. Barks  
Beard and Barks, P.L.L.C.  
2555 N. McGregor St.  
Houston, Texas 77004  
(713) 714-7431  
justen@beardandbarks.com

Justen S. Barks is entertainment and intellectual property practitioner in Houston. Mr. Barks began his entertainment pursuits at Belmont University in Nashville, Tennessee in 2004 where he majored in Music Business and Entertainment Industry Management. Prior to pursuing his legal education, Mr. Barks worked with the Fisk Jubilee Singers, Cherry Heart Music, and A&M Octone Records. Mr. Barks moved to Houston in 2010 to attend the University of Houston Law Center, and graduated in 2013, Order of the Barristers. Mr. Barks is currently a partner with Beard and Barks PLLC, a boutique entertainment and intellectual property firm representing clients in various industries. Mr. Barks has also proudly shared the teaching stage with Mr. Alonso since 2014 as an adjunct professor at the University of Houston Law Center teaching a course on Entertainment Law.

Mr. Barks has been regularly asked to speak to his knowledge of the entertainment industry for legal practitioners and entertainment professionals alike. In 2015 he spoke on the World Intellectual Property Day “Music of Houston,” panel; in February of 2016 he spoke on the Mack Performing Arts Collective and UH Institute for Intellectual Property and Information Law panel titled, “The Changing Economics of the Music Business”; in February 2017 he, along with Prof. Rick McElvaney presented the CLE, “Intellectual Property, Merchandising, and Fantasy Football,” for the UHLC Superbowl of CLE; in April 2017 he spoke on a panel for UH Libraries titled , “Culture Remix: Illegal Art, Copyright, and the Music Industry” alongside Dan Workman and Prof. Michael Olivas; and in November he presented a talk titled, “Legal Latverion: the Secret Wars of Comic Authors,” on behalf of TALA for the first annual Comic-Indie Convention in Houston.

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. IS COPYRIGHT A JOKE?..... 1

    A. The Tom Brady Joke Case ..... 1

    B. The Girl with the Colgate Smile ..... 2

    C. The Obligatory Fair Use Case..... 2

    D. It All Depends of What the Meaning of “Registration” Is ..... 3

III. COPYRIGHT V. THE WORLD..... 3

    A. Free Bird’s Blood Oath ..... 3

    B. Dreamin’ of Selena (Lawsuits) ..... 3

IV. A HOUSE (PLAN) DIVIDED..... 4

V. AND FROM THE WIDE WORLD OF SPORTS ..... 4

VI. BLURRED LINES..... 5

VII. BIG PIMPIN’ INTERNATIONAL DISPUTE ..... 5

VIII. THE MMA IN THREE ACTS..... 5

    A. Act One: Music Licensing Modernization & Digital Orphans ..... 6

        1. So Sad to Be All Alone in the World ..... 6

        2. So, What Happens Next?..... 7

    B. Act Two: The Classics Protection and Access Act ..... 7

        1. Thoroughly Modern ... Mickey? ..... 8

        2. Not in It for the Money..... 8

    C. Act Three: Allocation for Music Producers or “How the Other Half Lives”..... 8

IX. AN UNSOLICITED OPINION ON THE MMA..... 9

X. CONCLUSION: TURN OUT THE LIGHTS, THE PARTY’S OVER..... 10

**TABLE OF AUTHORITIES**

**Cases**

*ABS Entertainment, Inc. v CBS Corporation*, 2018 WL 3966179 (9th Cir. 2018)..... 2

*American Society for Testing and Materials, Inc. v. Public Resource.Org Inc.*,  
896 F.3d 437, 444 (D.C. Cir. 2018) ..... 2

*Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696 (9th Cir. 1995) ..... 5

*Davis v. Electronic Arts, Inc.*, 2018 WL 1609289 (N.D. Cal. 2018)..... 4

*Design Basics, LLC v. Forrester Wehrle Homes, Inc.*, 2018 WL 1583103 (D.C. Ohio 2018)..... 4

*Fahmy v. Jay-Z*, 90-8 F.3d 383, 390 (9th Cir. 2018) ..... 5

*Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 345 (1991)..... 1, 2

*Flo & Eddie v. Sirius XM Radio, Inc.*, 2014 WL 4725382 (C.D. Cal 2014) ..... 7

*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4837765 (Fla. 2017) ..... 7

*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 849 F.3d 14 (2nd Cir. 2017) ..... 7

*Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338 (11th Cir. 2017)..... 3

*Golan v. Holder*, 565 U.S. 302 (2012)..... 8

*Kaseberg v. Conaco, LLC.*, 2008 WL 5994548 (D.C. Cal. 2018) ..... 2

*Kaseberg v. Conaco, Ltd.*, Case No. 15-cv-1637 JLS (DHB) (S.D. Cal., May 12, 2017)..... 1

*Maloney v. T3 Media*, 853 F.3d 1004 (9th Cir. 2017)..... 4

*Perez v. Quintanilla*, Cause No. 13-17-00143-CV (Tex. App.—Corpus Christi, Nov. 29, 2018) ..... 3

*Pohl v. MH SUB, LLC*, 314 F.S. 3d 1225 (N.D. Fla. 2018)..... 2

*Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357 (5th Cir. 2004) ..... 3

*Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 ( 2010 ) ..... 3

*Ronnie Van Zant, Inc. v. Artimus Pyle*, 270 F.Supp.3d 656 (S.D.N.Y. 2017) ..... 3

*Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253 (2nd Cir. 2018) ..... 3

*Star Athletica v. Varsity Brands*, 137 S.Ct. 1002 (2017) ..... 4

*Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 845 F.3d 652 (5th Cir. 2017)..... 4

*Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F.S. 2d 147, 163 (E.D. N.Y. 2002) ..... 1

*Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) ..... 5

**Statutes**

17 U.S.C. § 409(10) ..... 2

17 U.S.C. § 411(a)..... 3

17 U.S.C. §§ 409(7)–(8)..... 2

17 U.S.C. §102(a)..... 4

17 U.S.C. §102(a)(5)..... 4

17 U.S.C. §102(a)(8)..... 4

17 U.S.C. §106(6) ..... 7

**Other Authorities**

*Fagundes, Copyright Year in Review, HIPLA Annual Conference, Galveston, Texas, September 29, 2018.* ..... 2

*U.S. Copyright Office, Second Request for Reconsideration for the Refusal to Register A LITTLE BIT BAD, Blog Content, Brady Joke, February 3, 2015; Correspondence ID1-25KMZ9Z; SR #: 1-2752094070 (July 17, 2017)*..... 1

# THOROUGHLY MODERN COPYRIGHT, OR *WHAT IN THE DICKENS HAPPENED AFTER RAGNARÖK?*

## I. INTRODUCTION

Well, for one, the MMA happened. No, not Mixed Martial Arts, although the hand-to-hand fighting in the halls of Congress over copyright law had its moments. We are referring to the Music Modernization Act, passed by said Congress and signed into law by President Trump on October 11, 2018. Its stated goal is to, well, update and modernize the copyright law so that it keeps up with yesterday's technologies—primarily music streaming and digital downloads. If I may be permitted to plagiarize myself, last year I wrote that we seemed to be moving toward a civil law regime aimed at dealing with past technological developments which threaten the foundations of copyright: Ragnarök (or so we were told). History (and copyright law case books), teach us that, from their beginning, with the promulgation of Statute of Anne in 1710, copyright statutes have engaged in a futile effort to keep up with technology.

So here we go again—a new law that kinda sorta fixes some problems with the old law and creates lots and lots of new work for lawyers. What a country! Of course, there's also been lots of copyright case law this past year and we will discuss that also. Instead of simply covering each case without context, we will try to tackle 'em in a way that makes sense to practitioners. Then, the next order of business is to gather hands around the maypole and analyze the MMA. So, into the fog we roll!

## II. IS COPYRIGHT A JOKE?

### A. The Tom Brady Joke Case

If there was ever a legal issue that we thought was settled, it was the low standard of creativity required to qualify for copyright protection. But even that standard is being vigorously litigated in the courts. Take the Tom Brady joke case, for example.

In the 2015 Super Bowl, the New England Patriots defeated the Seattle Seahawks after a last-minute interception by rookie cornerback Malcolm Butler in the end zone. The Seahawks' knuckle-headed pass play was called from the sidelines by Seattle head coach Pete Carroll. After the game, Patriots quarterback Tom Brady was named the Super Bowl's Most Valuable Player and received the customary truck. Brady already had two MVPs under his belt. As one of the highest paid players in the NFL, he was the last Patriot to need a truck. So, Brady said that he was going to give the truck to Butler, an underpaid rookie, for his game-winning play. Late-night comedians had a feast with Pete Carroll's infamous play call.

One of late-night comedian Conan O'Brien's jokes from the play became the subject of an important, albeit short, ruling by the U.S. Copyright Office. O'Brien's joke during his monologue was that, "Tom Brady said he wants to give the truck that he was given as Super Bowl MVP...to the guy who won the Super Bowl for the Patriots. Which is very nice. I think that's nice. I do. So Brady's giving his truck to Seahawks coach Pete Carroll."

Comedy writer Robert Kaseberg was not amused; he had earlier tweeted:

**"Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy the truck, Pete Carroll."**

Kaseberg's application for copyright registration raised the issue of the joke's eligibility for copyright. At first, the Copyright Office refused to register this joke; but, on a second motion for reconsideration, the Copyright Office Review Board found that it exhibited "copyrightable authorship." U.S. Copyright Office, Second Request for Reconsideration for the Refusal to Register A LITTLE BIT BAD, Blog Content, Brady Joke, February 3, 2015; Correspondence ID1-25KMZ9Z; SR #: 1-2752094070 (July 17, 2017). Citing the landmark case of *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 345 (1991), the Board opined that it met "the threshold of copyright protection articulated in *Feist*." However, it also found that the copyright was "thin" and, because it was composed of elements in the public domain, "only the organization of those elements that is protectable." *Ibid*, quoting *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F.S. 2d 147, 163 (E.D. N.Y. 2002).

Kaseberg sued O'Brien and the show's producers for copyright infringement based on the Tom Brady joke and four others. O'Brien moved for summary judgment, which was granted as two of the jokes and denied for the others, including the Tom Brady joke. While finding that the jokes were only entitled to "thin" protection "[they] are sufficiently objectively virtually identical to create a triable issue of fact regarding whether a jury would find these objective similarities to be virtually identical within the context of the entire joke." *Kaseberg v. Conaco, Ltd.*, Case No. 15-cv-1637 JLS (DHB) (S.D. Cal., May 12, 2017).



This year O'Brien suffered another legal setback in the case with respect to the Tom Brady joke. The District Court granted Kaseberg's motion for summary judgment on O'Brien's affirmative defenses that Kaseberg had defrauded the Copyright Office and unclean hands. After describing the history of Kaseberg's registration attempts, the Court concluded that:

"It is clear that Plaintiff is under no obligation to disclose everything related to the Tom Brady joke to the Office. For example, Plaintiff is required to include, among other things, 'the year in which creation of the work was completed' and, 'if the work has been published, the date and nation of its first publication.' See 17 U.S.C. §§ 409(7)–(8). Plaintiff is not required, however, to provide the geographical coordinates for where he composed the work, what he ate for breakfast that morning, or what color underwear he was wearing at the time, *see generally* 17 U.S.C. § 409, unless that is 'information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.'" 17 U.S.C. § 409(10); *Kaseberg v. Conaco, LLC*, 2008 WL 5994548 (D.C. Cal. 2018).

### **B. The Girl with the Colgate Smile**

The *Tom Brady* joke case, of course, cites the iconic "phone book" case that is included in every copyright casebook, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340 (1991). In *Feist*, the Supreme Court held that "the requisite level of creativity is extremely low; even a slight amount will suffice." *Ibid*, at 345. In *Pohl v. MH SUB, LLC*, 314 F.S. 3d 1225 (N.D. Fla. 2018), the District Court held in a pun-filled opinion that before-and-after photographs of cosmetic dental work performed on a patient did not qualify for copyright protection. The decision is being appealed.

But *Tom Brady* and *Pohl* are not the first cases to test how many angels can dance on the head of a pin. In the wide world of music, the issue before the 9<sup>th</sup> Circuit was whether re-mastered sound recordings were not copyrightable. Again, citing *Feist*, the Court concluded "that a derivative sound recording distinctly identifiable solely by the changes incident to the change in medium generally does not exhibit the minimum level of originality to be copyrightable." *ABS Entertainment, Inc. v. CBS Corporation*, 2018 WL 3966179 (9th Cir. 2018). So, let the micro-analysis continue!

### **C. The Obligatory Fair Use Case**

No Copyright discussion is complete without the required Fair Use Case. The leading case in 2018 is particularly interesting, having to do with the copyrightability of technical standards contained in manuals such as building and electronic, and manufacturing codes published by Standards Developing Organizations (SDOs). Some of these published standards which are created with the input of government officials and are designed to assist in the compliance with government standards and regulations. The standards and specifications contained in these manuals may also be incorporated by reference in the laws and regulations of all branches of government. Six such SDOs sued Public.Resource.org Inc. (PRO) a non-profit company whose stated mission was to "to make the law and other government materials more widely available." To that end, SROs "distributed on the internet technical standards that had been incorporated by reference into law." *American Society for Testing and Materials, Inc. v. Public Resource.Org Inc.*, 896 F.3d 437, 444 (D.C. Cir. 2018). The D.C. Circuit Court reversed and remanded the District Court's summary judgment for the plaintiff on the issue of copyright infringement on narrow grounds, finding "that the novel and complex issues raised by this case resolve in a manner entirely ordinary for our court: reviewing the record afresh, as our standard of review requires, we conclude—unlike the district court—that, as to the fair use defense, genuine issues of material fact preclude summary judgment for either party." *Ibid*, at p. 453.

Perhaps what is most significant is what the Court did not decide. According to Professor Dave Fagundes,

"what the court expressly did not decide was whether technical standards were copyrightable in the first instance, though it certainly expressed skepticism that they were. Nor did the court find that the defendants' conduct amounted to fair use as a matter of law. Rather, they rejected the district court's argument that the defendants' conduct was categorically not fair use, and remanded for consideration of whether the conduct was fair use in light of the statutory factors embodied in section 107." *Fagundes, Copyright Year in Review, HIPLA Annual Conference, Galveston, Texas, September 29, 2018*.

#### D. It All Depends of What the Meaning of “Registration” Is

The *Tom Brady* case also touched on the Copyright Act’s registration requirement, yet another basic, but unsettled, issue which is now before the United States Supreme Court. There is currently a split among the circuits concerning whether the Copyright Act means what it says. The Act provides that “[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.” 17 U.S.C. § 411(a). However, the 5<sup>th</sup> and 9<sup>th</sup> Circuits have held that it is sufficient to plead that “the deposit, application, and fee required for registration” have been filed. *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). To resolve the conflict the Supreme Court has now granted certiorari in a case where the 11<sup>th</sup> Circuit affirmed the Defendant’s Motion to Dismiss because the Plaintiff had not yet obtained a copyright registration for its online articles before suing WallStreet.com for copyright infringement. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338 (11th Cir. 2017), *cert. granted*, (138 S. Ct. 2707).

### III. COPYRIGHT V. THE WORLD

#### A. Free Bird’s Blood Oath

Last year we discussed the tension in the cases between Copyright Law and the freedom of speech and the general difference in litigation outcomes, depending on whether the claim was contractual in nature. One contractual claim that failed to prevail over the freedom of speech is the “blood oath” agreement in the *Lynyrd Skynyrd* case, formally known as *Ronnie Van Zant, Inc. v. Artimus Pyle*, 270 F.Supp.3d 656 (S.D.N.Y. 2017). When we left that case last year, a New York District Court had granted a permanent injunction, after a bench trial, enforcing the “blood oath” never to use the name Lynyrd Skynyrd again” taken by the surviving band members. The blood oath had been modified by a later written consent order which settled a previous lawsuit between the band members, together with costs, and attorneys’ fees.

To recap the facts, Artimus Pyle, the former drummer for the Lynyrd Skynyrd Southern rock band, had become heavily involved with a film about the band’s airplane crash in 1977, initially titled *Free Bird*. The drummer and the film’s production company were sued. The Court found that the drummer was bound by the consent agreement and enjoined the production company and others from distributing the film (Pyle was not enjoined because he had conveyed his rights to the production company). The Court dismissed the defendants’ argument that the film was historical and entitled to first amendment protection because the drummer had bargained away his first amendment rights. The film was being produced with the unlawful help of the drummer, the film was really about Lynyrd Skynyrd, was being made without authorization to use the names of Ronnie Van Zant or Steven Gaines. The production company, however, appealed and won.

On October 10, 2018, the Second Circuit found that under the terms of the consent order, the drummer was allowed “to make a movie that describes his experiences with Lynyrd Skynyrd and refer to the band, but ...not make a movie that is a history of the band.” According to the opinion, such terms were “inconsistent, or at least insufficiently precise, to support an injunction.” And “even though the injunction here has allegedly been imposed as a result of a private contract rather than government censorship, it nonetheless retains the viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction.” The 2<sup>nd</sup> Circuit did not approve it here, reversed the District Court’s judgment and vacated the injunction. *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253 (2nd Cir. 2018).

#### B. Dreamin’ of Selena (Lawsuits)

The Contract prevailed over the First Amendment in another carry-over case from last year. Chris Perez, the widower of Tejano singer Selena, suffered another setback in the lawsuit brought against him by his former father-in-law, Abraham Quintanilla, Jr., alleging that Perez breached his agreement to convey the right to exploit all “Entertainment Properties” related to Selena when he wrote a book titled *To Selena With Love* in 2011 and, more recently contracted with a production company to make a film or television series based on the book. Perez moved to dismiss the lawsuit pursuant to Texas’s Anti-SLAPP statute, codified in Chapter 27 of the Texas Civil Practices and Remedies Code. The motion was denied by the trial court and was affirmed on appeal in November 2018. *Perez v. Quintanilla*, Cause No. 13-17-00143-CV (Tex. App.—Corpus Christi, Nov. 29, 2018). Viewing the evidence in the most favorable light to Quintanilla, the Court ruled that, “the evidence is sufficient to support a rational inference that a justiciable controversy about the enforceability and scope of the Agreements exists.” (citations omitted. *Ibid*, at p.9.)

So could it be a coincidence that within a month of this appellate decision Netflix announced a new scripted drama series based on Selena's life with--surprise!--Abraham Quintanilla, Jr. as an executive producer?

#### IV. A HOUSE (PLAN) DIVIDED

Last year, the Super Bowl of 2017 copyright case was the United States Supreme Court's decision in *Star Athletica v. Varsity Brands*, 137 S.Ct. 1002 (2017), dealing with the copyright protection afforded to cheerleader uniforms under the pictorial, graphic or sculptural (PGS) work provisions of the Copyright Act—§102(a)(5) for those keeping score. As you may recall, Justice Thomas' majority opinion adopted, the "separability" analysis used by the Copyright Office, meaning that only a feature that can be separately identified from, and exist independently of, a useful article (here, cheerleading uniforms) is eligible for copyright protection.

This year the applicability and scope of the PGS provision with respect to architectural works (here, home design plans) was discussed in an opinion from Federal District Court in Ohio. The case's level of difficulty was exacerbated by the fact that the plans at issue were created both before and after 1990, which was when the Copyright Act was amended by the Architectural Works Copyright Protection Act (AWCPA) to specifically include architectural works. So, what's the big deal? Well, in plain English, the PGS copyright allowed the author to protect her drawings, but she remained powerless to prevent the construction of a building based on the drawings. For works created after 1990, the architect can protect the drawings under PGS and, under the AWCPA, can also prohibit the construction of a building based upon the copyrighted drawings. *Design Basics, LLC v. Forrester Wehrle Homes, Inc.*, 2018 WL 1583103 (D.C. Ohio 2018) (citing 17 U.S.C. §102(a)(8)).

#### V. AND FROM THE WIDE WORLD OF SPORTS

Last year we visited a significant opinion on copyright preemption in the 5<sup>th</sup> Circuit written by Judge Greg Costa and concluded that when a contract is not in play, copyright law was the betting favorite. In *Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 845 F.3d 652 (5th Cir. 2017), the Court held that an unfair competition claim was preempted by copyright law.

*Ultraflo* involved an unfair competition by misappropriation claim under Texas Law. The plaintiff alleged that Pelican, a competitor, "stole its drawings showing how to design valves and then used them to make duplicate valves." *Ultraflo*, at 653. After a jury rejected its other claims, the plaintiff appealed the trial court's dismissal of its claims for misappropriation of trade secrets because they were preempted by copyright law. The Fifth Circuit affirmed the dismissal.

Now we have the denial of a motion to dismiss and the affirmation of a dismissal, both discussing copyright preemption, but this time from the 9<sup>th</sup> Circuit (yeah, I know). Following the analysis in *Ultraflo*, as well as opinions from the 3<sup>rd</sup> and 8<sup>th</sup> Circuits, the 9<sup>th</sup> Circuit held that when the Copyright Act is triggered, it trumps the right of publicity. In *Maloney v. T3 Media*, 853 F.3d 1004 (9th Cir. 2017), the Court affirmed the dismissal, based on copyright preemption, of two former college basketball players' right of publicity claims against T-3 Media. The claims were based on T-3 Media's storing, hosting, and licensing the athletes' photographs from an NCAA championship game on its Paya.com website. T-3 did so pursuant to its contract with the NCAA. In a thorough opinion, the 9<sup>th</sup> Circuit drew a distinction between right of publicity claims that are preempted by copyright and those that were not:

"[A] publicity-right claim may proceed when a likeness is used non-consensually on merchandise or in advertising. But where a likeness has been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use, a publicity-right claim is little more than a thinly disguised copyright claim because it seeks to hold a copyright holder liable for exercising his exclusive rights under the Copyright Act." *Ibid*, at 1016.

Or put another way, copyright generally *es mas macho* than the right of publicity, except when copyright does not apply. In *Davis v. Electronic Arts*, EA moved to dismiss a complaint filed by former NFL football players for the alleged use of their likeness in the iconic Madden games. *Davis v. Electronic Arts Inc.*, 2018 WL 1609289 (N.D. Cal. 2018). Hanging their hat on the *Maloney v. T-3* opinion, EA argued that the "alleged likenesses plaintiffs seek to protect appear in copyrighted artistic visual work (the Madden games), and the work itself is being distributed for personal use" The Court disagreed, finding that the Plaintiffs' claims were not covered by copyright: "The crucial distinction is that the likenesses of the *Maloney* plaintiffs were fixed in photographs, thereby satisfying the copyright prerequisite that the subject matter be an 'original work of authorship fixed in any tangible medium of expression...from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.'" *Davis v. Electronic Arts*, N.D. Cal, Dec. 11, 2017, citing 17 U.S.C. §102(a). The Court's

opinion is consistent with *Maloney v. T-3*, because since likeness was **not** captured in a copyrighted artistic visual work, Copyright was not triggered.

## VI. BLURRED LINES

Before we discuss the MMA, we need to talk about another development that's rocked the music world, a/k/a the *Blurred Lines* Case. After California U.S. District Court entered a judgment in accordance with a jury verdict finding that Robin Thicke and Pharrell Williams' song *Blurred Lines* infringed on Marvin Gaye's 2013 hit song *Got to Give It Up*, the conventional wisdom was that the decision would be reversed by the 9<sup>th</sup> Circuit. It wasn't. Instead, the 9<sup>th</sup> Circuit found that the finding of "substantial similarity" between the two songs was not against the clear weight of the evidence based on the Plaintiff's experts opinions of a "constellation of similarities" and that "multiple other areas of extrinsic similarity, including the songs' signature phrases, hooks, bass melodies, word painting, the placement of the rap and "parlando" sections, and structural similarities on a sectional and phrasing level." *Williams v. Gaye*, 895 F.3d 1106, 1127 (9th Cir. 2018). While the majority emphasized that the ruling was a function of the limited nature of judicial review of a jury verdict, the dissent argued that the Court had sanctioned the copyrightability of a musical groove:

"The majority allows the Gayes to accomplish what no one has before: copyright a musical style. 'Blurred Lines' and 'Got to Give It Up' are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere." *Ibid*, at p.1138.

On remand to the District Court, the Marvin Gaye's family was awarded a \$5.3 million judgment. The *Blurred Lines* can be viewed as an unprecedented expansion of the scope of copyright, perhaps even the protection of moral rights dressed as copyright or the 9<sup>th</sup> Circuit's strict interpretation of the federal court's power of judicial review of jury verdicts. Whichever is correct, the California District Courts will surely be the venue of choice for copyright infringement lawsuits based on the substantial similarity of sound recordings.

## VII. BIG PIMPIN' INTERNATIONAL DISPUTE

Unlike Thicke and Williams, Jay-Z and Timbaland successfully defended an infringement suit brought against them based on their alleged infringement of naked moral rights. They were sued by the heirs of Egyptian composer Baligh Hamdy after using Hamdy's song, without permission, in 1999's *Big Pimpin'*. However, Timbaland and Jay-Z were later able to settle up with Hamdy's music publisher EMI Music Arabia for the payment of a \$100,000.00 license fee. This was not the end of the story.

Alleging that their publishing agreement did not convey Hamdy's moral rights to the music, Hamdy's heirs sued Jay-Z, whose motion for judgment as a matter of law was granted following trial. The 9<sup>th</sup> Circuit affirmed for two reasons:

"First, federal law does not recognize the moral rights at issue here. The Copyright Act recognizes some moral rights, but only for certain work[s] of visual art. ... No provision of the Act recognizes a moral right to prevent distortions or mutilations of copyrighted music...Moreover, [t]he Convention guarantees only that holders of foreign copyrights are afforded the same protection as holders of domestic copyrights, a policy known as the 'principle of national treatment.'" *Fahmy v. Jay-Z*, 90-8 F.3d 383, 390-391 (9th Cir. 2018), citing *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995) (internal quotations omitted).

## VIII. THE MMA IN THREE ACTS

The Music Modernization Act is an omnibus act comprised of three distinct sections: (1) the Mechanical Licensing Collective and its regulations; (2) the Classics Act; and (3) the Allocation for Music Producers Act. Of the three, the MLC is the more complex, attempting to bring mechanical licensing into the digital mainstream—the way the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998 did for performance licensing—and creating another potential SoundExchange/Super Harry Fox-like Frankenstein monster in the form of the as-yet designated Mechanical Licensing Collective. The Classics Act, a relatively straightforward bit of legislation, is Congress' most recent entry into what has become a long list of acts designed to extend rights of copyright holders both temporally and substantively. Finally, the Allocation for Music Producers Act ("AMP") provides a statutory mechanism "music participants" such as music producers, who traditionally accounted for their contributions to sound recordings through contract.

**A. Act One: Music Licensing Modernization & Digital Orphans**

The Copyright Act splits protection in a song between the sound recording and the underlying musical composition (including the arrangement, music, and lyrics). Over the last forty years, the sound recording became the statutory king of music copyrights. First gaining a foothold in the Copyright Act in 1972, sound recordings went on to gain in the digital realm, what they never could in terrestrial radio markets: a right to royalties for digital performances. Since composers lobbied and obtained rights under Section 115 for mechanical reproductions in the 1909 Act, not much could be said about mechanical licensing or the royalties owed from using the underlying musical composition, beyond the semi-regular adjustments in the royalty rates set by the Copyright Royalty Board.

Now, after 110 years, compositions are enjoying their moment. One of the MMA's stated goals is to modernize the mechanical royalty collection, distribution, and licensing process for the digital age. Interactive music services must pay licenses for the public performance of the sound recording and the reproduction of the underlying composition. Until now, these services, such as Apple Music, Deezer, Spotify, and Tidal, to name a few, have made payments on their sound recording obligations, but rarely, if ever, collected information about the songwriters of the composition. The royalties paid by these services were less than half of what was owed. The streaming services made the argument that such an infrastructure was not in place to properly distribute the royalties. In short, the streaming services claimed there was no efficient way to answer the questions, "who wrote it, and where do we send the royalties?"

Therefore, companies like Spotify wrote off these royalties as liabilities on their profit and loss statements to indicate that they would be paid when the songwriters or their publishers were found. The problem was, they never went looking. The digital mechanical royalties for the reproduction of composition through streaming were left effectively orphaned from the authors and payees.

**1. So Sad to Be All Alone in the World**

The MMA's answer to the question of "who wrote that song and where do we send the royalties?" is "if you build it, they will come." Be assured that, although the call and response appear to be disjointed, they absolutely are. The MMA designates the Register of Copyrights to begin the process of forming a Mechanical Licensing Collective ("MLC"). The MLC acts both as a safe harbor for digital streaming services, and a clearinghouse for songwriters. As a safe harbor the MLC, in conjunction with the MMA, allow digital streaming services to completely sidestep the question. They are not required to determine who wrote a song. They are not required to make sure that the songwriters are legally paid. Instead, as soon as the MMA became effective, it instantly granted a license to every single composition on the planet—past, present, and future.<sup>1</sup> Additionally, the MMA revokes the ability for individuals or entities to recover statutory damages against a digital music streaming service for infringement, so long as it follows the Act. The penalty for non-compliance is stiff: the failure to provide notice to the copyright owner forecloses the ability to obtain a compulsory license.

All the information and money that we assumed that digital music streaming services were collecting, is now turned over to the MLC, a quasi-government non-profit organization which will have a board of directors comprised primarily of music industry stake holders and, we are told, some form of government oversight. The exact method of operation of the MLC is still unknown, but its mandate is to figure that out. What we do know is that the MLC will collect all those lonely orphan royalties into two buckets, the unclaimed accrued royalties generated prior to the MMA's enactment, and the unclaimed accrued royalties generated going forward. The first bucket has been reported as being valued at anywhere from \$800M to \$1.5B. What happens to that money is ultimately up to the songwriters who have yet to claim it.

Although the MMA designates a transition period which ends on January 1, 2020, once the MLC has been created and begins operations, songwriters will have a one-year window to follow the MLC's procedures to identify their songs and claim their orphan royalties. Thereafter, the MLC's directive allows it to liquidate those royalties to unregistered industry organizations (e.g. those with direct license relationships with digital music streaming services) based on market share.

The process is similar for bucket two. However, rather than a one-year window, songwriters have a three-year window to claim their orphan royalties before they are liquidated based on market share.

---

<sup>1</sup> For those interested in the extra dry details of copyright law, the instant "all songs everywhere" license is made possible through the United States' participation in the Berne Convention, which states that when there is a licensable event, the laws of the country where the licensable event occurs apply. Therefore, even if a song was written and recorded in Mexico, if it is posted to a Spotify US client and streamed in the United States, the MMA governs licensing and distribution of mechanical royalties.

## 2. So, What Happens Next?

As we stated at the outset, this makes a bunch of work for attorneys. If you have worked with SoundExchange to obtain royalties or properly designate featured artists, you have some idea of what this means for songwriters. Songwriters who are not affiliated with a music publisher, or who use DIY distribution platforms are encouraged to review their streaming numbers and reach out to the services that are streaming their music to settle up on their unclaimed royalties as soon as possible. There is absolutely no reason to wait, as the process only becomes more complicated once the MLC goes live.

One note of caution: the MMA not only fails to correct the cumbersome compulsory licensing procedures, it exacerbates them. Under the compulsory license, the distributor must make royalty statements and payments under oath on the 20<sup>th</sup> of each month for the preceding month, comply with all regulations, **and** provide cumulative annual statements of account which are certified by a CPA. To address this, the MLC will probably issue a “work-around” license, much like the Harry Fox Agency has done.

Once the MLC is live, there will be more incentive than ever to be certain copyrights in compositions are registered with the Copyright Office. The MLC is directed to collect information about pure Section 115 rights, which are tied to copyright registrations. Attorneys can help make sure the compositions are registered, the songwriters are set up with the MLC, and that the royalties are properly claimed from the first bucket. Attorneys should also help their publishing company clients get set up with the MLC. While licensing mechanicals through the MLC is not required, it is incentivized under the MMA. Publishers who choose to engage with streaming companies through direct licenses will be forced to pay a penalty based on their market share. To obtain this, the MMA directs the digital music streaming services to share confidential and proprietary information about all companies operating on their platforms, regardless of whether they are MLC participants.

## **B. Act Two: The Classics Protection and Access Act**

The Classics Act is fairly intuitive: it gathers into Federal copyright protection sound recordings which were previously only protected under state law, if any, and affords them infringement and licensing protections. This does not mean that copyright in these sound recordings are immediately converted into federal copyrights. Rather, the Classics Act adds pre-1972 recordings to the federal scheme as a sort of second-class copyright. They are afforded federal infringement protections, and access to the existing Sections 112 and 114 statutory licensing requirements. In this way, state and common law copyright protections are preempted as to digital transmissions of sound recordings but are otherwise unaffected by the Act.

With the Classics Act, Congress simply fixed the problem that it had created with respect to sound recordings. Sound recordings of music (as opposed to music compositions and lyrics) were not covered by federal copyright law until 1972 (and even **then**, Congress failed to address the status of pre-1972 recordings), leaving them in a legal twilight zone. Taking advantage of this black hole, satellite radio broadcaster Sirius XM did not obtain licenses for pre-1972 sound recordings before playing them on their stations. To do this, Sirius XM also made back-up or buffer copies of these recordings.

Since they had not authorized Sirius XM to broadcast their recordings, the members of the popular 1960’s band The Turtles sued in various states through their corporation, Flo & Eddie Inc., for unfair competition and common law copyright infringement of their pre-1972 recordings. They had initial success in California, aided by a 1982 statute which specifically addressed the copyrights to pre-1972 recordings. In *Flo & Eddie v. Sirius XM Radio, Inc.*, 2014 WL 4725382 (C.D. Cal 2014), the Court granted their motion for summary judgment against Sirius XM’s unauthorized public performance of The Turtles’ songs. Unfortunately for Flo & Eddie, this was the high-water mark for their claims.

After the New York Court of Appeals responded to the Court’s certification that New York common law did not recognize a right of public performance for creators of pre-1972 sound recordings, the Second Circuit reversed the denial of Sirius XM’s motion for summary judgment and remanded the case to the District Court with instructions that Flo & Eddie’s claims be dismissed with prejudice. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 849 F.3d 14 (2nd Cir. 2017). In a third case, Flo & Eddie’s claims were also rejected in Florida. ” *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4837765 (Fla. 2017).

However, as a result of the Classics Act, Flo & Eddie—and all owners of pre-1972 recordings—are now entitled to royalties for the digital audio transmissions. **Significantly, the MMA does not provide for any public performance royalty for airplay on terrestrial radio for pre-1972 or post-1972 sound recordings. 17 U.S.C. §106(6).**

Other than closing the loophole Sirius XM exploited, the most interesting aspects this short piece of legislation are two-fold. First, it creates an additional four methods of calculating a pre-1972 sound recording copyright’s term. Second, while pre-1972 sound recordings are afforded the protections of the Copyright Act, including Section 107’s fair use factors, the Classics Act creates what appears to be a secondary statutory fair use for noncommercial uses of

pre-1972 recordings. While it may seem that retroactively extending protection for sound recordings that were created before the most recent overhaul of the Copyright Act in 1976 is anything but “modern,” federal protection for pre-1972 sound recordings affords these works the same digital performance royalty streams of contemporary works (i.e. streaming royalties from SoundExchange).

### 1. Thoroughly Modern ... Mickey?

The Classics Act retroactively affects sound recordings created even before 1923. However, the methods of determining the copyright term for such sound recordings are bracketed as follows:

1. For sound recordings first published before January 1, 1923, the term expires on December 31, 2021;
2. For sound recordings first published between January 1, 1923 and December 31, 1946, the term expires on the December 31st following 100 years from the date of the first publication;
3. For sound recordings first published between January 1, 1947 and December 31, 1956, the term expires on the December 31st following 105 years from the date of first publication; and
4. For sound recordings **fixed and unpublished** before January 1, 1957 or that were **published** between January 1, 1957 and February 14, 1972, the term expires on February 15, 2067.

Several commentators have argued that, like the international copyright “claw-back” wrapped into the Uruguay Round Agreements Act and litigated in *Golan v. Holder*, 565 U.S. 302 (2012), the Classics Act retroactively extends the term of the pre-1972 recordings beyond the already onerous life + 70 *p.m.a.*, 120-, or 95-year terms. However, the Act makes clear that for claims prior to its enactment, the state statutory or common law schemes that governed pre-1972 works will still apply. Thus, the Classics Act is purely **prospective** and only grants sound recording copyright holders the benefit of federal protection (including digital transmission licensing and statutory infringement schema), going forward. Thus, a sound recording first published on January 1, 1972 would only net an effective digital performance right “term” of 48 years. Beyond this, the term of protection for pre- and post-1972 sound recordings, which was established by the 1976 Act, remain unimpacted.

### 2. Not in It for the Money

As noted previously, only some specific portions of the Copyright Act apply to pre-1972 sound recordings after the enactment of the Classics Act. Importantly, Section 107’s fair use factors only apply as a defense against infringement of a pre-1972 sound recording—just like post-1972 sound recordings! However, the Classics Act built in its own quasi-fair use “safe harbor” provision, allowing for registered noncommercial uses of covered sound recordings. While the new scheme will feel very familiar to anyone who dealt with orphan works in mechanical licensing, use will at least be less susceptible to abuse.

If a person wants to use a pre-1972 sound recording in a noncommercial manner, that person must make a “good faith, reasonable search” for the sound recording: (1) in the Copyright Office’s records, and (2) on streaming or music sales services which “offer a comprehensive set of sound recordings.” If the person cannot find the sound recording in the Copyright Office’s records or, presumably, on Spotify, the person must then file a notice identifying: (1) the sound recording, and (2) the desired nature of the noncommercial use with the Copyright Office. Thereafter, the notice will be published to a public records database and the owner of the sound recording may “opt-out” of the noncommercial use by filing a counter-notice within 90-days. If all goes well, the search was made in good faith and was reasonable, and the copyright holder does not opt-out of the use within the statutory time period, the noncommercial use will not be subject to infringement of the sound recording under Sections 502-505 or 1202.

If that is as clear as mud, at least it is consistent with much of the rest of the Copyright Act. Fortunately, the Classics Act requires the Register of Copyrights to promulgate rules, by around mid-April, to clarify nearly every aspect of this process, including what is meant by a “good faith, reasonable search,” in the eyes of the Copyright Office. However, in what is undoubtedly a boon for attorneys, while the Copyright Office’s steps will be considered “sufficient” to obtain safe harbor protection, they are not “necessary.”

### C. **Act Three: Allocation for Music Producers or “How the Other Half Lives”**

As we touched on above, the 1995 and 1998 revisions to the Copyright Act added a right to digital transmission of sound recordings, and a statutory scheme for collecting performance royalties therefrom. The result of this process is the non-profit organization SoundExchange. SoundExchange’s orders are to collect performance royalties from digital music services like Pandora and SiriusXM and slice the pie three ways: 50% of the royalties to the owner of the sound recording copyright; 45% of the royalties to recording artists featured on the sound recording; and 5% of the royalties are stashed away for a fund for non-featured performers, including session union musicians.

Under the AMP Act, Congress is directing a “non-profit”—we are assuming it will be SoundExchange—to slice the pie one more way, for three groups never before represented or even mentioned in an American copyright statute: producers, mixers, and sound engineers of a sound recording. In order to get the benefit of the AMP Act, an individual must have been a:

1. a producer, mixer, or sound engineer;
2. under a written contract with a record company involved in the creation of a sound recording;
3. in which contract the producer, mixer, or engineer is entitled to payments from royalties otherwise payable to a featured artist (these are traditionally called “points”);
4. the producer, mixer, or engineer must have made a creative contribution to the sound recording; and
5. must submit to SoundExchange a certification under penalty of perjury that it meets the first four prongs and a copy of the contract with the recording company.

Once these requirements are met, SoundExchange must notify the featured artist or artists that one or more producers, mixers, or engineers are seeking payment. This notification must occur at least 120 days before a distribution is first made to any producer, mixer, or engineer. If the featured artist or artists do not object at least 10 business days before the first distribution is made, a fourth slice of the pie—two percent (2%) of the royalties—is cut and delivered to any claiming producers, mixers, or engineers. This slice is cut from the royalties that would be paid to the featured artists, and is evenly split among any producers, mixers, or engineers claiming it.

Anyone who has worked with SoundExchange in the past can likely see the pitfalls here. First, the requirement that the producer, mixer, or sound engineer produce his or her contract with the recording company is likely to be problematic, considering the substantial steps labels take to keep these agreements confidential. Second, the AMP Act specifically provides an opportunity for featured artists to contest the reduction in their 45% royalty. SoundExchange traditionally has a difficult time dealing with artists contesting that other artists on a sound recording are featured or not. The dispute resolution system is a remote form of mediation, and SoundExchange regularly directs artists to file suit against each other to determine their rights to the featured artist royalty stream.

The dispute provisions of the AMP Act only exacerbate the problem of fighting over royalties. First, under the Act, one featured artist may object, while the others do not. If this occurs, the featured artists who do not object to the certification of a producer, mixer, or sound engineer have their share reduced, while the objecting artist or artists do not. The Act includes no guidance on what to do once the objection is made of record. Also of note, while the contract with the producer, mixer, or sound engineer must be with the recording company, the royalty comes from the featured artist share. The AMP Act appears to unintentionally incentivize artists to reject payments whenever possible.

Finally, the addition of producers, mixers, and sound engineers is only mentioned in this dark corner of the Copyright Act. They are given none of the exclusive rights, nor any other substantive or procedural right under the Act. We will see whether the AMP Act’s inclusion is helpful, but we suspect our freedom of contract friends who have been negotiating producer and engineer points for decades at more than 2% will have the last laugh.

## **IX. AN UNSOLICITED OPINION ON THE MMA**

Though it is not particularly overt, the MMA illuminates Congress’s intentions to centralize copyright protection. From the 1909 Act until now, American copyright law softly incentivized registration with the Copyright Office, affording copyright protection upon fixation in a tangible medium, and doing away with formalities. Now, it appears that Congress has thought better of this route.

The foundational underpinnings of both the Music Licensing Modernization and the Classics Act provisions places a significant degree of responsibility on the Copyright Office and on copyright holders to register with it. Getting music into the MLC and royalties out will require a registration. Preventing non-commercial use of pre-1972 sound recordings requires registration. As a practical matter, the technological infrastructure of the Copyright Office is more outmoded than either of the other two intellectual property offices. However, the MMA, in one way or another, points a big red arrow at 101 Independence Ave. and as attorneys we will need to be capable of navigating it the same way we do PAIR and TESS.

Finally, while the “Modernization” Act certainly contemplates digital media, it doubtless misses the point of what is truly modern about the music industry today. Once more, the law fails to grasp the thrust of today’s technology. Rather than utilizing the power technology provides to individual creators, it shifts control away from them to big record companies, big publishers, and big content providers. At the risk of joining the world’s copy-leftists in hyperbole, it might have been better to call the MMA the Music Monetization Act. The MMA adds a couple of pots that should have existed for the last twenty years and gives more people an opportunity to get their hands in and dig around.



**X. CONCLUSION: TURN OUT THE LIGHTS, THE PARTY'S OVER**

As Don McLean said in his mega-hit song, *American Pie*, “there we are all in one place, a generation stuck in space, with no time left to start again.” And so it is in the Winter of 2018-2019 as the war between copyright, fair use, and the first amendment continues, just as it has done for over 300 years. Like the battle for the Pacific in World War II, these concepts battle for each and every island, one at a time. However, unlike the Pacific front, there will be no clear victory for either side, only the ebb and flow of the jurisprudence that seeks to accommodate these forever frenemies. And so it goes...